

Aug 07, 2018

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

LIZETH A.,

Plaintiff,

vs.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No. 1:17-cv-03074-MKD

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AND DENYING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

ECF Nos. 13, 14

BEFORE THE COURT are the parties' cross-motions for summary judgment. ECF Nos. 13, 14. The parties consented to proceed before a magistrate judge. ECF No. 6. The Court, having reviewed the administrative record and the parties' briefing, is fully informed. For the reasons discussed below, the Court grants Plaintiff's motion (ECF No. 13) and denies Defendant's motion (ECF No. 14).

JURISDICTION

The Court has jurisdiction over this case pursuant to 42 U.S.C. § 1383(c)(3).

STANDARD OF REVIEW

A district court’s review of a final decision of the Commissioner of Social Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is limited; the Commissioner’s decision will be disturbed “only if it is not supported by substantial evidence or is based on legal error.” *Hill v. Astrue*, 698 F.3d 1153, 1158 (9th Cir. 2012). “Substantial evidence” means “relevant evidence that a reasonable mind might accept as adequate to support a conclusion.” *Id.* at 1159 (quotation and citation omitted). Stated differently, substantial evidence equates to “more than a mere scintilla[,] but less than a preponderance.” *Id.* (quotation and citation omitted). In determining whether the standard has been satisfied, a reviewing court must consider the entire record as a whole rather than searching for supporting evidence in isolation. *Id.*

In reviewing a denial of benefits, a district court may not substitute its judgment for that of the Commissioner. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001). If the evidence in the record “is susceptible to more than one rational interpretation, [the court] must uphold the ALJ’s findings if they are supported by inferences reasonably drawn from the record.” *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012). Further, a district court “may not reverse an

1 ALJ's decision on account of an error that is harmless." *Id.* An error is harmless
2 "where it is inconsequential to the [ALJ's] ultimate nondisability determination."
3 *Id.* at 1115 (quotation and citation omitted). The party appealing the ALJ's
4 decision generally bears the burden of establishing that it was harmed. *Shinseki v.*
5 *Sanders*, 556 U.S. 396, 409-10 (2009).

6 **FIVE-STEP EVALUATION PROCESS**

7 A claimant must satisfy two conditions to be considered "disabled" within
8 the meaning of the Social Security Act. First, the claimant must be "unable to
9 engage in any substantial gainful activity by reason of any medically determinable
10 physical or mental impairment which can be expected to result in death or which
11 has lasted or can be expected to last for a continuous period of not less than twelve
12 months." 42 U.S.C. § 1382c(a)(3)(A). Second, the claimant's impairment must be
13 "of such severity that he is not only unable to do his previous work[,] but cannot,
14 considering his age, education, and work experience, engage in any other kind of
15 substantial gainful work which exists in the national economy." 42 U.S.C. §
16 1382c(a)(3)(B).

17 The Commissioner has established a five-step sequential analysis to
18 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §
19 416.920(a)(4)(i)-(v). At step one, the Commissioner considers the claimant's work
20 activity. 20 C.F.R. § 416.920(a)(4)(i). If the claimant is engaged in "substantial

1 gainful activity,” the Commissioner must find that the claimant is not disabled. 20
2 C.F.R. § 416.920(b).

3 If the claimant is not engaged in substantial gainful activity, the analysis
4 proceeds to step two. At this step, the Commissioner considers the severity of the
5 claimant’s impairment. 20 C.F.R. § 416.920(a)(4)(ii). If the claimant suffers from
6 “any impairment or combination of impairments which significantly limits [his or
7 her] physical or mental ability to do basic work activities,” the analysis proceeds to
8 step three. 20 C.F.R. § 416.920(c). If the claimant’s impairment does not satisfy
9 this severity threshold, however, the Commissioner must find that the claimant is
10 not disabled. 20 C.F.R. § 416.920(c).

11 At step three, the Commissioner compares the claimant’s impairment to
12 severe impairments recognized by the Commissioner to be so severe as to preclude
13 a person from engaging in substantial gainful activity. 20 C.F.R. §
14 416.920(a)(4)(iii). If the impairment is as severe or more severe than one of the
15 enumerated impairments, the Commissioner must find the claimant disabled and
16 award benefits. 20 C.F.R. § 416.920(d).

17 If the severity of the claimant’s impairment does not meet or exceed the
18 severity of the enumerated impairments, the Commissioner must pause to assess
19 the claimant’s “residual functional capacity.” Residual functional capacity (RFC),
20 defined generally as the claimant’s ability to perform physical and mental work

activities on a sustained basis despite his or her limitations, 20 C.F.R. § 416.945(a)(1), is relevant to both the fourth and fifth steps of the analysis.

At step four, the Commissioner considers whether, in view of the claimant's RFC, the claimant is capable of performing work that he or she has performed in the past (past relevant work). 20 C.F.R. § 416.920(a)(4)(iv). If the claimant is capable of performing past relevant work, the Commissioner must find that the claimant is not disabled. 20 C.F.R. § 416.920(f). If the claimant is incapable of performing such work, the analysis proceeds to step five.

At step five, the Commissioner considers whether, in view of the claimant's RFC, the claimant is capable of performing other work in the national economy. 20 C.F.R. § 416.920(a)(4)(v). In making this determination, the Commissioner must also consider vocational factors such as the claimant's age, education and past work experience. 20 C.F.R. § 416.920(a)(4)(v). If the claimant is capable of adjusting to other work, the Commissioner must find that the claimant is not disabled. 20 C.F.R. § 416.920(g)(1). If the claimant is not capable of adjusting to other work, analysis concludes with a finding that the claimant is disabled and is therefore entitled to benefits. 20 C.F.R. § 416.920(g)(1).

The claimant bears the burden of proof at steps one through four above. *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to step five, the burden shifts to the Commissioner to establish that (1) the claimant is

capable of performing other work; and (2) such work “exists in significant numbers in the national economy.” 20 C.F.R. § 416.960(c)(2); *Beltran v. Astrue*, 700 F.3d 386, 389 (9th Cir. 2012).

ALJ’S FINDINGS

Plaintiff filed an application for Title XVI supplemental security income benefits on December 4, 2013, alleging a disability onset date of the same date. Tr. 139-44. The application was denied initially, Tr. 81-88, and on reconsideration, Tr. 92-97. Plaintiff appeared at a hearing before an administrative law judge (ALJ) on June 25, 2015. Tr. 35-59. On October 20, 2015, the LAJ denied Plaintiff’s claim. Tr. 17-34.

At step one of the sequential evaluation analysis, the ALJ found Plaintiff has not engaged in substantial gainful activity since December 4, 2013. Tr. 22. At step two, the ALJ found Plaintiff has the following severe impairments: affective disorder and eating disorder. Tr. 22. At step three, the ALJ found Plaintiff does not have an impairment or combination of impairments that meets or medically equals the severity of a listed impairment. *Id.* The ALJ then concluded that Plaintiff had the RFC to perform a full range of work at all exertional levels but with the following non-exertional limitations: she can “perform simple, routine tasks, and have only superficial interaction with co-workers and incidental interaction with the public.” Tr. 24.

1 At step four, the ALJ found Plaintiff has no past relevant work. Tr. 29. At
2 step five, the ALJ found that, considering Plaintiff's age, education, work
3 experience, RFC, and testimony from a vocational expert, there were other jobs
4 that existed in significant numbers in the national economy that Plaintiff could
5 perform, such as kitchen helper, conveyor feeder, cleaner, pricing marker, and
6 package sorter. Tr. 29-30. The ALJ concluded Plaintiff was not under a disability,
7 as defined in the Social Security Act, from December 4, 2013 through October 20,
8 2015, the date of the ALJ's decision. Tr. 30.

9 On February 15, 2017, the Appeals Council denied review, Tr. 1-6, making
10 the ALJ's decision the Commissioner's final decision for purposes of judicial
11 review. *See* 42 U.S.C. § 1383(c)(3).

12 ISSUES

13 Plaintiff seeks judicial review of the Commissioner's final decision denying
14 her disability income benefits under Title XVI of the Social Security Act. ECF
15 No. 13. Plaintiff raises the following issues for this Court's review:

- 16 1. Whether the ALJ properly weighed Plaintiff's symptom claims;
- 17 2. Whether the ALJ properly weighed the medical opinion evidence; and
- 18 3. Whether the ALJ's RFC formulation is supported by substantial
19 evidence.

20 ECF No. 13 at 4.

DISCUSSION

A. Plaintiff's Symptom Claims

Plaintiff faults the ALJ for failing to rely on reasons that were clear and convincing in discrediting her subjective symptom claims. ECF No. 13 at 16-20. An ALJ engages in a two-step analysis to determine whether a claimant's testimony regarding subjective pain or symptoms is credible. "First, the ALJ must determine whether there is objective medical evidence of an underlying impairment which could reasonably be expected to produce the pain or other symptoms alleged." *Molina*, 674 F.3d at 1112 (internal quotation marks omitted). "The claimant is not required to show that her impairment could reasonably be expected to cause the severity of the symptom she has alleged; she need only show that it could reasonably have caused some degree of the symptom." *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009) (internal quotation marks omitted).

Second, "[i]f the claimant meets the first test and there is no evidence of malingering, the ALJ can only reject the claimant's testimony about the severity of the symptoms if [the ALJ] gives 'specific, clear and convincing reasons' for the rejection." *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (quoting *Lingenfelter v. Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007)). "General findings are insufficient; rather, the ALJ must identify what testimony is not credible and what evidence undermines the claimant's complaints." *Id.* (quoting *Lester v. Chater*, 81

1 F.3d 821, 834 (9th Cir. 1995)); *Thomas v. Barnhart*, 278 F.3d 947, 958 (9th Cir.
2 2002) (“[T]he ALJ must make a credibility determination with findings sufficiently
3 specific to permit the court to conclude that the ALJ did not arbitrarily discredit
4 claimant’s testimony.”). “The clear and convincing [evidence] standard is the most
5 demanding required in Social Security cases.” *Garrison v. Colvin*, 759 F.3d 995,
6 1015 (9th Cir. 2014) (quoting *Moore v. Comm’r of Soc. Sec. Admin.*, 278 F.3d 920,
7 924 (9th Cir. 2002)).

8 In making an adverse credibility determination, the ALJ may consider, *inter*
9 *alia*, (1) the claimant’s reputation for truthfulness; (2) inconsistencies in the
10 claimant’s testimony or between her testimony and her conduct; (3) the claimant’s
11 daily living activities; (4) the claimant’s work record; and (5) testimony from
12 physicians or third parties concerning the nature, severity, and effect of the
13 claimant’s condition. *Thomas*, 278 F.3d at 958-59.

14 The ALJ found that Plaintiff’s medically determinable impairments could
15 cause Plaintiff’s alleged symptoms, but that Plaintiff’s testimony about the severity
16 of her symptoms was not entirely credible. Tr. 27.

17 *1. Lack of Supporting Medical Evidence*

18 The ALJ concluded that the objective medical evidence failed to support
19 Plaintiff’s symptom testimony. Tr. 27. Plaintiff challenges this conclusion, ECF
20 No. 13 at 19-20, and the Commissioner now declines to rely on this finding. ECF

No. 14 at 4 n.2. This was not a clear and convincing reason to discredit Plaintiff's symptom testimony.

2. *Academic Performance*

The ALJ concluded that Plaintiff's academic performance in high school undermined her testimony about her difficulty focusing. Tr. 27. An ALJ may consider good academic performance as an activity that is inconsistent with a claimant's reported functioning. *See Anderson v. Astrue*, No. 09-CV-220-JPH, 2010 WL 2854241, at *6 (E.D. Wash. July 19, 2010); *Payton v. Comm'r of Soc. Sec.*, No. CIV S-09-0879-CMK, 2010 WL 3835732, at *10 (E.D. Cal. Sept. 29, 2010); *see also Spittle v. Astrue*, No. 3:11-CV-00711-AA, 2012 WL 4508003, at *3 (D. Or. Sept. 25, 2012). Here, however, the ALJ's finding is not supported by substantial evidence.

Evidence that predates the claimant's alleged onset date is of limited relevance. *See Carmickle v. Comm'r, Soc. Sec. Amin.*, 533 F.3d 1155, 1165 (9th Cir. 2008); *Tesfamariam v. Colvin*, No. 15-CV-04966-LHK, 2016 WL 4270243, at *10 (N.D. Cal. Aug. 15, 2016). The ALJ noted that Plaintiff reported getting C's in high school and dropping out during the first half of her senior year. Tr. 56-57. Plaintiff was born in 1992, which would indicate that she left high school in approximately 2009-2010. Tr. 29. Plaintiff's alleged onset date is December 4, 2013. Tr. 20. The ALJ failed to explain how Plaintiff's alleged ability to focus

1 well enough in high school to receive average grades was relevant to her symptom
2 testimony about the period of alleged disability, three to four years later.

3 The Commissioner argues that this evidence is relevant due to the
4 longstanding nature of Plaintiff's impairment. ECF No. 14 at 6. Plaintiff reported
5 some mental health symptoms dating back to middle school. *See* Tr. 343.
6 However, the record indicates that Plaintiff's alleged onset date follows a severe
7 deterioration in her mental health in May 2013, prompted by the breakup of a long-
8 term relationship. Tr. 235, 277, 343, 350. The ALJ acknowledged that Plaintiff's
9 two psychiatric hospitalizations in May and July 2013 marked a "significant
10 deterioration" in her condition. Tr. 25. Without further explanation of how
11 Plaintiff's high school grades from several years prior to this deterioration were
12 relevant to her symptom testimony about the alleged period of disability, the ALJ's
13 conclusion is not supported by substantial evidence.

14 3. *Statements of Perceived Ability*

15 The ALJ found that Plaintiff's perceived ability to work undermined her
16 claims of complete disability. Tr. 27. Plaintiff's own perception of her ability to
17 work may be a proper consideration in determining credibility. *See Barnes v.*
18 *Comm'r of Soc. Sec.*, No. 2:16-cv-00402-MKD, 2018 WL 545722, at *5 (E.D.
19 Wash. Jan. 24, 2018). Here, the ALJ observed that Plaintiff reported participating
20 in the Job Corps program, pursuing work at a daycare, and pursuing online

1 courses. Tr. 27; *see* Tr. 44, 373, 375. However, Plaintiff's perceived ability to
2 pursue online courses does not indicate Plaintiff is capable to work on a full-time
3 basis. Similarly, Plaintiff was unsuccessful in the Job Corps program and was
4 granted a medical separation from the program due to her symptoms. Tr. 365.
5 Even if Plaintiff believed that she was capable of pursuing these activities, on this
6 record, they do not suggest that Plaintiff had more focus and energy than she
7 alleged. Tr. 27. This was not a specific and legitimate reason to discredit
8 Plaintiff's subjective symptom testimony.

9 4. *Effective Treatment*

10 The ALJ found Plaintiff's symptom testimony was less credible because
11 "her condition was improving" with medication. Tr. 27. The effectiveness of
12 treatment is a relevant factor in determining the severity of a claimant's symptoms.
13 20 C.F.R. § 416.929(c)(3) (2011); *see Warre v. Comm'r of Soc. Sec. Admin.*, 439
14 F.3d 1001, 1006 (9th Cir. 2006) (conditions effectively controlled with medication
15 are not disabling for purposes of determining eligibility for benefits) (internal
16 citations omitted); *see also Tommasetti v. Astrue*, 533 F.3d 1035, 1040 (9th Cir.
17 2008) (a favorable response to treatment can undermine a claimant's complaints of
18 debilitating pain or other severe limitations). Plaintiff testified at the hearing that
19 she used to experience debilitating panic attacks, but that they recently subsided
20

1 due to medication. Tr. 44-45. The ALJ relied on this statement to conclude that
2 Plaintiff's "condition was improving, contrary to her allegations." Tr. 27.

3 Although the record supports the ALJ's finding that Plaintiff's panic attacks
4 subsided with medication, the ALJ relied on this fact to conclude more broadly that
5 Plaintiff's condition overall improved with treatment. *Id.* The ALJ's conclusion
6 of general improvement based on the improvement of one of Plaintiff's symptoms
7 is not supported by substantial evidence. Observations of improvement must be
8 "read in context of the overall diagnostic picture" of an individual, and
9 improvement in some symptoms does not indicate nondisability under the Social
10 Security Act. *Ghanim*, 763 F.3d at 1161-62 (quoting *Holohan v. Massanari*, 246
11 F.3d 1195, 1205 (9th Cir. 2001)). The ALJ is not permitted to "cherry pick" from
12 mixed evidence to support a denial of benefits. *Garrison*, 759 F.3d at 1017 n.23.
13 Although Plaintiff's panic attacks may have subsided with medication, the record
14 shows Plaintiff's overall condition was not improving with treatment. *See* Tr. 270
15 (reported fatigue and depression on November 18, 2013); Tr. 341 (reports
16 depressive symptoms on February 11, 2014); Tr. 349 (PHQ-9 score consistent with
17 major depression on April 4, 2014); Tr. 382 (PHQ-9 score consistent with
18 moderate depression on July 9, 2014); Tr. 380 (Plaintiff losing weight and PHQ-9
19 score consistent with major depression on August 8, 2014); Tr. 378 (Plaintiff not
20 gaining weight and PHQ-9 score consistent with moderate depression on

1 September 8, 2014); Tr. 375 (PHQ-9 score consistent with moderate depression on
2 October 16, 2014); Tr. 365 (Plaintiff was granted medical separation from Job
3 Corps on April 28, 2015, due to weight loss and need to stabilize depressive
4 symptoms); Tr. 362 (Plaintiff still losing weight on May 1, 2015); Tr. 358
5 (Plaintiff reported depressive symptoms on June 1, 2015). The ALJ's observation
6 that Plaintiff's panic attacks subsided with medication is supported by substantial
7 evidence, but the more general conclusion that Plaintiff's overall condition "was
8 improving" was not similarly supported. This was not a clear and convincing
9 reason to discredit Plaintiff's symptom testimony.

10 *5. Daily Activities*

11 The ALJ found that Plaintiff's daily activities indicated she was "still quite
12 functional." Tr. 27. A claimant's reported daily activities can form the basis for
13 an adverse credibility determination if they consist of activities that contradict the
14 claimant's "other testimony" or if those activities are transferable to a work setting.
15 *Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007); *see also Fair v. Bowen*, 885 F.2d
16 597, 603 (9th Cir. 1989) (daily activities may be grounds for an adverse credibility
17 finding "if a claimant is able to spend a substantial part of his day engaged in
18 pursuits involving the performance of physical functions that are transferable to a
19 work setting."). "While a claimant need not vegetate in a dark room in order to be
20 eligible for benefits, the ALJ may discredit a claimant's testimony when the

1 claimant reports participation in everyday activities indicating capacities that are
2 transferable to a work setting” or when activities “contradict claims of a totally
3 debilitating impairment.” *Molina*, 674 F.3d at 1112-13 (internal quotation marks
4 and citations omitted). The ALJ noted Plaintiff testified to feeling depressed,
5 difficulty concentrating, and substantial fatigue. Tr. 24. The ALJ observed
6 Plaintiff reported daily household chores including vacuuming, doing the dishes,
7 and doing yardwork. Tr. 27; *see* Tr. 255. Plaintiff also testified that she prepares
8 meals for her housemates. Tr. 50. The ALJ could reasonably conclude that
9 Plaintiff’s ability to complete these household chores was inconsistent with the
10 fatigue symptoms Plaintiff alleged.

11 *6. Lack of Engagement with Treatment*

12 The ALJ concluded that Plaintiff’s failure to consistently engage with
13 treatment undermined her subjective symptom testimony. Tr. 27. Unexplained, or
14 inadequately explained, failure to seek treatment or to follow a prescribed course
15 of treatment may be the basis for an adverse credibility finding unless there is a
16 showing of a good reason for the failure. *Orn*, 495 F.3d at 638. Where the
17 evidence suggests lack of mental health treatment is part of a claimant’s mental
18 health condition, it is inappropriate to consider a claimant’s lack of mental health
19 treatment as evidence of a lack of credibility. *See Nguyen v. Chater*, 100 F.3d
20 1462, 1465 (9th Cir. 1996). Furthermore, disability benefits may not be denied

1 because of the claimant's failure to obtain treatment she cannot obtain for lack of
2 funds. *Gamble v. Chater*, 68 F.3d 319, 321 (9th Cir. 1995). Here, the ALJ found
3 that Plaintiff's failure to consistently engage with treatment "suggests that she did
4 not have a pressing need to mitigate or improve her condition, suggesting that her
5 condition was tolerable," therefore undermining her credibility. Tr. 27.

6 The record reflects that some of Plaintiff's failure to engage in treatment was
7 attributable to anxiety or a lack of health insurance. Plaintiff declined a
8 recommendation to group therapy due to her social anxiety. Tr. 343. Some
9 instances of Plaintiff's failure to seek health care were attributed to her lack of
10 insurance. Tr. 339 (Plaintiff reported she could not get treatment because she did
11 not have insurance); Tr. 277 (Plaintiff had no health insurance and no medical
12 coupons); Tr. 270-272 (Plaintiff began seeking referrals after obtaining Medicaid
13 health insurance). However, the ALJ accurately observed that once Plaintiff did
14 begin treatment, she only attended monthly counseling despite being recommended
15 weekly counseling.¹ Tr. 27; *see* Tr. 257 (weekly counseling recommended on
16
17

18 ¹ Plaintiff contends that "recommended treatment" is different from "prescribed
19 treatment." ECF No. 13 at 18. However, the Ninth Circuit has applied "prescribed
20 treatment" case law to instances of "recommended treatment." *Crosby v. Comm'r*

1 September 12, 2013); Tr. 382 (weekly sessions recommended on July 9, 2014); Tr.
2 368 (weekly depression group recommended on March 18, 2015); Tr. 362 (weekly
3 sessions recommended on May 1, 2015); Tr. 356 (weekly outpatient treatment
4 recommended on June 1, 2015). Plaintiff also failed to complete counseling
5 homework and to pick up her prescriptions. *See* Tr. 368, 373. It is the ALJ's
6 responsibility to resolve conflicts in the evidence. *Andrews v. Shalala*, 53 F.3d
7 1035, 1039 (9th Cir. 1995). Where the ALJ's interpretation of the record is
8 reasonable, it should not be second-guessed. *Rollins v. Massanari*, 261 F.3d 853,
9 857 (9th Cir. 2001). Here, although some of Plaintiff's failure to seek treatment
10 may have been attributable to anxiety or finances, the ALJ still reasonably
11 concluded that Plaintiff's failure to engage in treatment undermine her subjective
12 symptom testimony. This finding was supported by substantial evidence.

13 Of the many reasons offered by the ALJ to discredit Plaintiff's symptom
14 testimony, only two were minimally supported by evidence in the record. The
15 Court finds that, on balance, that ALJ's overall credibility analysis is not supported
16 by substantial evidence. This case is therefore remanded for the ALJ to reconsider
17 Plaintiff's symptom testimony.

18 _____
19 *of Soc. Sec. Admin.*, 489 Fed. Appx. 166, 2012 WL 2917029, at *1 (9th Cir. July
20 18, 2012).

1 **B. Medical Opinion Evidence**

2 Plaintiff challenges the ALJ's consideration of the medical opinions of
3 Philip Barnard, Ph.D., Phyllis Sanchez, Ph.D., Michael Brown, Ph.D., and Bruce
4 Eather, Ph.D. ECF No. 13 at 5-14.

5 There are three types of physicians: “(1) those who treat the claimant
6 (treating physicians); (2) those who examine but do not treat the claimant
7 (examining physicians); and (3) those who neither examine nor treat the claimant
8 [but who review the claimant's file] (nonexamining [or reviewing] physicians).”
9 *Holohan*, 246 F.3d at 1201-02 (citations omitted). Generally, a treating
10 physician's opinion carries more weight than an examining physician's, and an
11 examining physician's opinion carries more weight than a reviewing physician's.
12 *Id.* at 1202. “In addition, the regulations give more weight to opinions that are
13 explained than to those that are not, and to the opinions of specialists concerning
14 matters relating to their specialty over that of nonspecialists.” *Id.* (citations
15 omitted).

16 If a treating or examining physician's opinion is uncontradicted, the ALJ
17 may reject it only by offering “clear and convincing reasons that are supported by
18 substantial evidence.” *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).
19 “However, the ALJ need not accept the opinion of any physician, including a
20 treating physician, if that opinion is brief, conclusory and inadequately supported

1 by clinical findings.” *Bray v. Comm’r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228
2 (9th Cir. 2009) (internal quotation marks and brackets omitted). “If a treating or
3 examining doctor’s opinion is contradicted by another doctor’s opinion, an ALJ
4 may only reject it by providing specific and legitimate reasons that are supported
5 by substantial evidence.” *Bayliss*, 427 F.3d at 1216 (citing *Lester*, 81 F.3d at 830-
6 831).

7 *1. Dr. Barnard*

8 Dr. Barnard, the only non-reviewing source in the record, examined Plaintiff
9 on September 12, 2013, and opined Plaintiff had moderate impairments in her
10 ability to understand, remember, and persist in tasks by following very short and
11 simple instructions; learn new tasks; adapt to changes in a routine work setting;
12 make simple work-related decisions; be aware of normal hazards and take
13 precautions; and set realistic goals and plan independently; and marked
14 impairments in her ability to understand, remember, and persist in tasks by
15 following detailed instructions; perform activities within a schedule, maintain
16 regular attendance, and be punctual within customary tolerances without special
17 supervision; perform routine tasks without special supervision; ask simple
18 questions or request assistance; communicate and perform effectively in a work
19 setting; complete a normal work day and work week without interruptions from
20 psychologically based symptoms; and maintain appropriate behavior in a work

1 setting. Tr. 255-259. The ALJ gave this opinion limited weight. Tr. 28. Because
2 Dr. Barnard's opinion was contradicted by Dr. Brown, Tr. 66-67, and Dr. Eather,
3 Tr. 77-78, the ALJ was required to provide specific and legitimate reasons for
4 rejecting this opinion. *Bayliss*, 427 F.3d at 1216.

5 First, the ALJ found Dr. Barnard's opinion was rendered on a checkbox
6 form that was not explained or supported. Tr. 28. A medical opinion may be
7 rejected by the ALJ if it is conclusory or inadequately supported. *Bray*, 554 F.3d
8 at 1228; *Thomas*, 278 F.3d at 957. Also, individual medical opinions are preferred
9 over check-box reports. *See Crane v. Shalala*, 76 F.3d 251, 253 (9th Cir. 1996);
10 *Murray v. Heckler*, 722 F.2d 499, 501 (9th Cir. 1983). An ALJ may permissibly
11 reject check-box reports that do not contain any explanation of the bases for their
12 conclusions. *Crane*, 76 F.3d at 253. However, if treatment notes are consistent
13 with the opinion, a check-box form may not automatically be rejected. *See*
14 *Garrison*, 759 F.3d at 1014 n.17; *see also Trevizo v. Berryhill*, 871 F.3d 664, 667
15 n.4 (9th Cir. 2017) ("[T]here is no authority that a 'check-the-box' form is any less
16 reliable than any other type of form"). In addition to noting the checkbox format,
17 the ALJ concluded that Dr. Barnard's opinion was not explained and not
18 supported. Dr. Barnard opined Plaintiff's impairments would cause moderate
19 interference with her ability to work on a daily basis, yet opined more severe
20 marked limitations in several basic work activities. *Compare* Tr. 256 *with* Tr. 257.

1 Dr. Barnard did not explain how moderate findings indicated marked impairments.
2 Tr. 257. The ALJ reasonably concluded that Dr. Barnard's opined limitations were
3 entitled to less weight because they were not explained.

4 Second, the ALJ discredited Dr. Barnard's opinion because Dr. Barnard did
5 not have access to Plaintiff's subsequent treatment notes, which the ALJ
6 characterized as showing Plaintiff improved with medication. Tr. 28. The extent
7 to which a medical source is "familiar with the other information in [the
8 claimant's] case record" is relevant in assessing the weight of that source's medical
9 opinion. *See* 20 C.F.R. § 416.927(c)(6). Plaintiff's chief complaint to Dr. Barnard
10 was that she experienced panic attacks. Tr. 255. As the ALJ accurately noted,
11 Plaintiff's panic attacks later subsided with medication. Tr. 28; *see* Tr. 44-45. The
12 fact that Dr. Barnard was not familiar with Plaintiff's subsequent treatment notes
13 showing improvement in panic attacks was a specific and legitimate reason to
14 discredit his opinion based on Plaintiff's reports of panic attacks.

15 Third, the ALJ found Dr. Barnard's opinion was inconsistent with Plaintiff's
16 treatment notes. Tr. 28. Incongruity between a doctor's medical opinion and
17 treatment records or notes is a specific and legitimate reason to discount a doctor's
18 opinion. *Tommasetti*, 533 F.3d at 1041. Here, the ALJ concluded "there is no
19 indication in the claimant's treatment notes that she had marked restrictions or
20 limitations." Tr. 28. However, "[t]he ALJ must do more than state conclusions.

1 He must set forth his own interpretations and explain why they, rather than the
2 doctors' are correct." *Garrison*, 759 F.3d at 1012 (internal citations omitted).
3 Here, the ALJ cited no evidence to support this conclusion. Tr. 28. Without
4 further explanation of how this record supported the ALJ's conclusion, this was not
5 a specific and legitimate reason to discredit Dr. Barnard's opinion.

6 Here, the ALJ relied on at least one reason that was not supported by
7 substantial evidence in rejecting the opinion. Because this case is remanded for the
8 ALJ to reconsider Plaintiff's subjective symptom testimony, the ALJ is also
9 instructed to reconsider the medical opinion evidence on remand.

10 2. *Additional Assignments of Error*

11 Although Plaintiff challenges additional medical opinions, the Court will not
12 address each challenge individually. The ALJ is instructed to readdress all of the
13 medical evidence on remand in a manner consistent with this opinion.

14 **C. Remand**

15 Plaintiff urges this Court to remand for an immediate award of benefits.
16 ECF No. 13 at 11, 20. To do so, the Court must find that the record has been fully
17 developed and further administrative proceedings would not be useful. *Garrison*,
18 759 F.3d at 1019-20; *Varney v. Sec'y of Health and Human Servs.*, 859 F.2d 1396,
19 1399 (9th Cir. 1988). But where there are outstanding issues that must be resolved
20 before a determination can be made, and it is not clear from the record that the ALJ

1 would be required to find a claimant disabled if all the evidence were properly
2 evaluated, remand is appropriate. *See Benecke v. Barnhart*, 379 F.3d 587, 595-96
3 (9th Cir. 2004); *Harman v. Apfel*, 211 F.3d 1172, 1179-80 (9th Cir. 2000).

4 Here, it is not clear from the record that the ALJ would be required to find
5 Plaintiff disabled if all the evidence were properly evaluated. Even if the ALJ
6 were to fully credit Plaintiff's symptom testimony and Dr. Barnard's opinion, the
7 evidence would still present outstanding conflicts for the ALJ to resolve.
8 Therefore, further proceedings are necessary for the ALJ to properly address the
9 credibility of Plaintiff's symptom reports and properly weigh medical opinions in
10 the record. The ALJ may also need to supplement the record with any outstanding
11 evidence of Plaintiff's mental and physical capacity and take testimony from a
12 medical expert at a remand hearing. For this reason, this matter is remanded for
13 the ALJ to reconsider the Plaintiff's symptom testimony and the medical evidence.

14 CONCLUSION

15 Having reviewed the record and the ALJ's findings, the Court concludes the
16 ALJ's decision is not supported by substantial evidence and not free of harmful
17 legal error. **IT IS ORDERED:**

- 18 1. Plaintiff's motion for summary judgment (ECF No. 13) is **GRANTED**.
- 19 2. Defendant's motion for summary judgment (ECF No. 14) is **DENIED**.
- 20 3. Application for attorney fees may be filed by separate motion.

1 The District Court Executive is directed to file this Order, enter
2 **JUDGMENT FOR PLAINTIFF**, provide copies to counsel, and **CLOSE** the file.

3 DATED this August 7, 2018.

4 s/Mary K. Dimke
5 MARY K. DIMKE
6 UNITED STATES MAGISTRATE JUDGE
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